

A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule

I. INTRODUCTION

The scope of a landowner's duty to guard against criminal attack has not been easy for courts and legislatures to define explicitly. Statutory definition in this realm is rare;¹ courts are forced to make difficult choices between competing interests in attempting to delineate the parameters of liability. The doctrine of foreseeability is one means of limiting liability used by courts in this context. Foreseeability is a key element in formulating any legal duty;² a landowner ordinarily has no obligation to guard against unlawful acts³ of third persons until he has reasonable grounds to anticipate such acts.⁴ Therefore, the majority of courts in this country impose a duty upon the landowner only in specific situations which clearly indicate that criminal conduct is foreseeable.⁵ The most common situation triggering the duty is the occurrence of prior criminal attacks on the premises.⁶ This concept will be referred to as the "prior similar incidents rule."⁷ However, a recent California Supreme Court

1. In some instances, states have passed statutes or regulations requiring maintenance of "safe" premises. The measures required by statute have been imposed upon landlords in the typical landlord/tenant relationship; hence, they are outside the scope of this Article. See *infra* note 14. Furthermore, these statutes have *not* been generally interpreted to impose a duty to guard against criminal attack. Rather, they are usually mere codifications of standards regarding the physical condition of the premises. In order to serve as the basis for a landowner's liability, a statute, regulation, or ordinance must specifically require owners to undertake particular security measures. Gibbins & Pan, *Landlords and Third Party Criminal Conduct*, 22 Trial 48 (March 1986). See, e.g., *Williams v. William J. Davis, Inc.*, 275 A.2d 231 (D.C. App. 1971); *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (1965); *Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985) (duty imposed upon apartment house owner by statute to keep all doors and windows of a vacant structure securely closed deemed to have been breached; therefore, defendant held liable for rape committed by third party); *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980) (landlord's liability to tenant who was mugged in hallway of apartment complex premised on landlord's failure to comply with regulation requiring locks on entrance doors).

2. Foreseeability is relevant in defining the limits of both duty and proximate cause. See generally W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 43, at 284-90 (5th ed. 1984); Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 151 (1982) ("the risk reasonably to be perceived defines the duty to be obeyed . . .") (quoting Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928)).

3. Throughout this Article, "unlawful acts," "criminal attack," "criminal incidents," and "criminal conduct" will be used interchangeably. The scope of these terms is intended to encompass most intentional crimes resulting in physical harm to persons. Homicide, felonious assault, assault, kidnapping, and rape are included. In general, any attack which is not direct and personal is excluded. However, such crimes against property may be included in determining whether prior similar incidents have occurred. See *infra* note 7.

4. See RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965). "[The possessor] . . . is ordinarily under no duty to exercise any care until he knows he has reason to know that the acts of third persons are occurring, or about to occur."

5. Comment, *Business Inviters' Duty to Protect Invitees From Criminal Acts*, 134 U. PA. L. REV. 883, 891 (1986).

6. See, e.g., *Winn-Dixie Stores, Inc. v. Johnstoneaux*, 395 So. 2d 599 (Fla. App. 1981); *McClendon v. Citizens & Southern Nat'l Bank*, 155 Ga. App. 755, 272 S.E.2d 592 (1980); *Taylor v. Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981); *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981). In each of these cases, recovery for the plaintiff was conditioned to a large extent on the occurrence of prior similar incidents which gave rise to the defendant's duty. See also *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 717 (Mo. App. 1983) (evidence that the business premises were in a high crime area did not give rise to a duty to protect, absent allegations of specific prior crimes on the premises); *Gillot v. Washington Metro. Area Transit Auth.*, 507 F. Supp. 454 (D.C. 1981) (finding no duty because no history of rapes in the area of attack).

7. The rule has been applied with varying degrees of rigidity. Some courts do not explicitly distinguish between

decision has departed from this rigid rule which in the past barred the victim's recovery in the absence of prior similar incidents.⁸ In *Isaacs v. Huntington Memorial Hospital*,⁹ the court rejected an exclusive application of the prior similar incidents rule and instead focused its inquiry upon the total factual setting of the case. Accordingly, the absence of prior similar incidents did not preclude plaintiff's recovery as a matter of law.¹⁰ The court concluded that prior similar incidents, though helpful, are not essential to establish foreseeability.¹¹

Judicial decisions in Ohio condition landowner liability upon a finding that prior criminal incidents have occurred.¹² Such incidents provide the landowner with the requisite notice that criminal attacks may be likely. The notion that a commercial landowner is not an insurer of the safety of business invitees underlies much of the judicial thought in this area of Ohio law.¹³ However, the Ohio Supreme Court has not yet rendered an opinion on this subject.

The general justification for imposing a duty upon the landowner to guard against criminal attacks is examined in this Article. This Article also analyzes the propriety of abandoning the prior similar incidents rule because (1) foreseeability is incapable of strict definition, (2) application of the rule usurps the historical function of the jury, and (3) the rule undermines important social and economic policies. Finally, this Article explores the contours of Ohio law in this area and advocates that the Ohio Supreme Court reject the prior similar incidents rule and adopt the "totality-of-the-circumstances" approach espoused in *Isaacs*.

the nature of the previous occurrences of criminal conduct on the premises in implementing the prior similar incidents rule. Other courts vary along a continuum, with the most stringent approach requiring the same crime to occur in essentially the same manner before a duty will be imposed. *See, e.g.,* *Townesley v. Cincinnati Gardens, Inc.*, 39 Ohio App. 2d 5, 314 N.E.2d 406 (1973) (requiring occurrence of prior similar incidents occurring at the same location and under nearly identical circumstances); *Uihlein v. Albertson's, Inc.*, 282 Or. 631, 580 P.2d 1014 (1978) (location in high crime area and previous shoplifting at store not sufficient to create likelihood of criminal attack upon store patron); *Fernandez v. Miami Jai-Alai, Inc.*, 386 So. 2d 4 (Fla. App. 1980) (requiring "like crimes of violence"); *Butler v. Acme Markets*, 89 N.J. 270, 445 A.2d 1141 (1982) (landowner held liable for patron's assault in light of seven muggings within past several months); *Taylor v. Dixon*, 8 Ohio App. 3d 161, 456 N.E.2d 558 (1982) (seven prior robberies held not to be notice of possible shooting in course of the eighth robbery); *Taylor v. Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981) (knowledge of crimes against property is not sufficient to give rise to a duty to protect customers against physical assaults); *Morgan v. Bucks Assocs.*, 428 F. Supp. 546 (E.D. Pa. 1977) (77 car thefts and 15 attempted car thefts, although property crimes, were sufficient to put landowner on notice of likelihood of personal attack); *McCoy v. Gay*, 165 Ga. App. 590, 302 S.E.2d 130 (1983) (two prior crimes occurring on the premises but not in the parking lot insufficient to constitute foreseeability; incidents compared must be "substantially similar"); *Foster v. Winston-Salem Joint Venture*, 274 S.E.2d 265 (N.C. App. 1981) (requisite notice not properly attributed to landowner for assault on patron where 36 criminal incidents had occurred, but only six were characterized as assaults on the person). The *Foster* case subsequently was reversed by the North Carolina Supreme Court, which held the question of the landowner's notice was for resolution by the jury; therefore summary judgment was improper. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981).

8. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985). Courts in contexts other than that considered in this Article, *see infra* note 14, particularly in the landlord/tenant relationship, have also held that plaintiffs may establish foreseeability other than by evidence of prior similar incidents. *See, e.g.,* *Dick v. Great South Bay Co.*, 106 Misc. 2d 686, 435 N.Y.S.2d 240 (N.Y. Civ. Ct. 1981); *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 2d 324, 176 Cal. Rptr. 494 (1981); *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. App. 1985).

9. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

10. *Id.* at 131, 695 P.2d at 662, 211 Cal. Rptr. at 365.

11. *Id.* at 135, 695 P.2d at 665, 211 Cal. Rptr. at 368.

12. *See, e.g.,* *Daily v. K-Mart Corp.*, 9 Ohio Misc. 2d 1, 458 N.E.2d 471 (1981); *Townesley v. Cincinnati Gardens, Inc.*, 39 Ohio Misc. 1, 314 N.E.2d 406 (1973), *rev'd*, 39 Ohio App. 2d 5, 314 N.E.2d 409 (1974).

13. *Howard v. Rogers*, 19 Ohio St. 2d 42, 47, 249 N.E.2d 804, 807 (paragraph 2 of the syllabus) (1969).

II. GENERAL BACKGROUND

A. *The Landowner's Duty to Provide Protection Against Criminal Attack*

The relationship between a landowner¹⁴ and business patrons¹⁵ who enter the land gives rise to the owner's duty to protect the patrons against an unreasonable risk of physical harm.¹⁶ Yet, in spite of the traditional duty imposed upon commercial landowners to protect others against unreasonable risk of harm, American courts initially were reluctant to hold a landowner liable for criminal acts occurring on the premises.¹⁷ Historically, a private individual had no duty to protect another from a criminal attack.¹⁸ At common law, courts were reluctant to impose liability for nonfeasance;¹⁹ in addition, the failure to impose liability may also be attributed to basic principles of tort law.²⁰ A finding of duty is essential to recovery in a negligence action.²¹ Foreseeability is thought to define duty; hence, if an act is deemed unforeseeable, a duty is never established.²² Refusal to extend liability to landowners for criminal acts of third persons was thus based on the perception that criminal acts were unforeseeable; therefore, no duty to guard against such acts ever arose.

14. For purposes of this Article, the scope of the term "landowner" or "possessor of land" will be limited. The term shall be used to mean the owner of establishments held open for commercial use, such as shopping malls, retail establishments, sports arenas, hospitals. Specifically excluded, although related, are cases dealing with the landlord/tenant, innkeeper/guest, and carrier/passenger relationships.

15. The term "patron" is used here to encompass those members of the public who enter in response to the landowner's explicit or implicit invitation. These individuals were traditionally classified as "invitees." See RESTATEMENT (SECOND) OF TORTS § 322(3) (1965). However, use of this term is avoided due to the number of jurisdictions which have abolished the status classifications in favor of a single duty of care. See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. App. 1972); *Burns v. Bradley*, 120 N.J. 542, 419 A.2d 1069 (1980); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976); *Marioenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975).

16. See RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

17. Absent a specific relationship between the parties such as innkeeper/guest, carrier/passenger, or inviter/invitee, the traditional common law approach rejected any assertion that private parties have any duty at all to guard against criminal attack. *Id.* at § 314. Several reasons have been advanced to justify judicial reluctance to interfere with the traditional "no duty" rule. Such reasons include failure to satisfy the requisites of the negligence cause of action because the criminal act was viewed as an intervening cause of harm, the act was deemed unforeseeable, or the vagueness of the standard of care prevented adequate assessment of the defendant's conduct. Furthermore, unfavorable economic consequences and the fear of contravening the policy that the protection of citizens is the duty of the government also contributed to the failure to impose liability. Comment, *supra* note 5, at 889; *Comppropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975).

Another commentator has advanced several explanations for courts' resistance to the duty. Professor Zacharias has drawn on theories advanced by several scholars to conclude that three possible explanations exist to justify this judicial reluctance: (1) liability contravenes economic theory by skewing resource allocation; (2) the inherent unfairness in forcing private parties to take measures or accept responsibility for actions beyond their control; and (3) process concerns that recognition of the duty would create, such as increased litigation and lack of institutional competency to resolve issues. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 702 (1986).

18. See RESTATEMENT (SECOND) OF TORTS § 314 (1965). See also Bazzyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727, 735 (1979).

19. See RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965).

20. Note, *Tort Liability in Georgia for the Criminal Acts of Another*, 18 GA. L. REV. 361, 364 (1983).

21. In order to establish negligence, one must show the existence of a duty, a breach of that duty, and the injury resulting therefrom. *Feldman v. Howard*, 10 Ohio St. 2d 189, 226 N.E.2d 564 (1967); W. PROSSER & P. KEETON, *supra* note 2, § 30 at 164-65 (elements of the negligence cause of action include duty, breach of the duty, proximate cause, actual loss or damage).

22. See *supra* note 2 and accompanying text.

Modern judicial thought invokes a somewhat more flexible analysis, and the Second Restatement of Torts illustrates the reluctance to retain the earlier rule of "unforeseeability per se."²³ The Restatement indicates in Section 302B that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."²⁴ Most courts have moved away from the common law approach and now permit recovery against landowners in instances where criminal attack is reasonably foreseeable.²⁵ The Restatement codifies this principle in Section 344, specifically pertaining to commercial landowners. The section provides:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.²⁶

Section 344 may be considered the starting point in any duty analysis of this type.²⁷

B. The Prior Similar Incidents Rule to Establish Foreseeability

Imposition of a duty to provide reasonable protection and the evolution of the prior similar incidents rule can be attributed, in part, to an analogous area of law: landlord/tenant law.²⁸ The leading case in the area of liability for criminal attack in landlord/tenant law is *Kline v. 1500 Massachusetts Ave. Apartment Corp.*²⁹ In *Kline*,

23. Zacharias, *supra* note 17, at 698-99 (Section 344 acknowledges changing trend). See *infra* text accompanying note 26.

24. See RESTATEMENT (SECOND) OF TORTS § 302B (1965).

25. Comment, *supra* note 5, at 891 ("The majority of courts that have considered inviters' liability are unwilling to say that a business inviter never has a duty to take reasonable steps to protect invitees from criminal acts.").

Recovery, however, is not universal. Despite the fact that landowner liability for criminal attack has increased recently, some courts still remain reluctant to impose liability on landlords. See Gibbins & Pan, *supra* note 1, at 48. See also *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976) (no duty found due to lack of causal relationship); *Cook v. Safeway Stores, Inc.*, 354 A.2d 507 (D.C. App. 1976) (duty to prevent robbery did not arise, even if it were foreseeable); Comment, *supra* note 5, at 889-90.

26. See RESTATEMENT (SECOND) OF TORTS § 344 (1965).

27. Section 344 appears to be a more particularized codification of the principle expressed in Section 302B. Section 302B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which intended to cause harm, even though such conduct is criminal." Essentially, Section 302B stands for the broad proposition that an actor will not be absolved of liability for acts posing an unreasonable risk of harm to another, even if the harm is brought about by a third party. Liability under Section 302B turns, however, upon *foreseeable* intervention of the third party, and a finding of negligence will not be precluded even though the foreseeable conduct is intentional or criminal. See RESTATEMENT (SECOND) OF TORTS § 302B (1965). Section 344 specifically applies this general doctrine to the commercial landowner.

28. Bazzyler, *supra* note 18, at 740. Professor Bazzyler discusses the similarities between the two relationships: "Both are possessors of land, which they operate for commercial purposes. Both deal with clients who come with the expectation of obtaining security as consideration for payment. Both have better knowledge about the crime problem." *Id.* at 740, n.77. See also *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982) (landlord/tenant principles apply to commercial shopkeeper context).

29. 439 F.2d 477 (D.C. Cir. 1970). Professor Bazzyler described *Kline* as "[t]he major case standing for the recognition of these factors, and consequent establishment of this duty." Bazzyler, *supra* note 18, at 741. See also Zacharias, *supra* note 17, at 699 (describing *Kline* as the "seminal case" in the development of liability for failure to take security measures).

a tenant was assaulted in a common hallway of an apartment building.³⁰ The United States Court of Appeals for the District of Columbia Circuit held the landlord liable for failure to take reasonable steps to protect tenants from attack.³¹ The decision was based, among other factors, on the landlord's notice of repeated criminal assaults and robberies in the common areas of the building.³² Furthermore, the court stressed the landlord's exclusive exercise of control over these areas.³³ The *Kline* decision, however, offered little guidance as to predictable standards of foreseeability.³⁴ Accordingly, many of the cases following *Kline* focused upon determining what constitutes notice sufficient to impose a duty.³⁵

Since *Kline*, most jurisdictions have required the occurrence of prior similar incidents on the landowner's premises before the possibility of criminal attack becomes sufficiently foreseeable to warrant imposition of a duty.³⁶ The Supreme Court of Maryland expressed the major thrust of the prior similar incidents rule in *Scott v. Watson*.³⁷ The court stated: "[T]his duty arises primarily from criminal activities existing on the landlord's premises, and not from knowledge of general criminal activities in the neighborhood."³⁸

Ohio has declined to follow *Kline* in the context of landlord/tenant law.³⁹ In *Thomas v. Hart Realty, Inc.*,⁴⁰ recognition of a common law duty imposed upon landlords to provide reasonable protection against entry into separately rented apartments was rejected.⁴¹ The court refused to impose a duty even in light of "foreseeable entries in a 'high crime area.'"⁴² The court distinguished *Kline* because the criminal activity did not take place in a common area of the complex which was under the landlord's exclusive control.⁴³ Furthermore, unlike the relationship of business inviter and invitee, the relationship of landlord and tenant does not traditionally give rise to a duty of reasonable protection.⁴⁴ Consequently, the court

30. *Kline v. 1500 Massachusetts Ave. Corp.*, 439 F.2d 477, 478 (D.C. Cir. 1970).

31. *Id.* at 487.

32. *Id.* at 483.

33. *Id.* at 482-83.

34. This ambiguity is particularly apparent in light of the language in *Kline* noting that the landlord is "not an insurer" of the tenant's safety. *Id.* at 487.

35. Note, *Landlord Liability to Tenants for Crimes of a Third Party: The Status in Florida*, 6 NOVA L.J. 145, 150 (1981).

36. For a general application of the prior similar incidents rule, see *supra* note 7. See also *Relyea v. State*, 385 So. 2d 1378 (Fla. App. 1980) (plaintiffs could not recover against landowner for murder occurring on university grounds, absent a showing of prior similar criminal acts); *School Bd. of Palm Beach County v. Anderson*, 411 So. 2d 940 (Fla. App. 1982) (occurrence of prior similar assaults was sufficient to raise jury question in action against county school board for injury suffered on high school campus); *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976) (landlord held liable where previous criminal activity had occurred on the premises).

37. 278 Md. 160, 359 A.2d 548 (1976).

38. *Id.* at 169, 359 A.2d at 554.

39. See *Thomas v. Hart Realty Inc.*, 17 Ohio App. 3d 83, 477 N.E.2d 668 (1984). The *Kline* rationale, although rejected in the realm of landlord/tenant law, has been applied by Ohio courts in the context of the business inviter/invitee relationship. See *supra* note 12 and accompanying text. The current status of Ohio law requires prior criminal activity on the premises in order to give rise to the landowner's duty. *Id.*

40. 17 Ohio App. 3d 83, 477 N.E.2d 668 (1984).

41. *Id.*, 477 N.E.2d at 669.

42. *Id.* at 85, 477 N.E.2d at 670.

43. *Id.*, 477 N.E.2d at 670.

44. *Id.*, 477 N.E.2d at 670.

concluded that abandonment of the traditional landlord/tenant duties which arise from the contractual terms of the lease, properly lies with the legislature.⁴⁵

A minority of courts since *Kline*, including cases outside the area of landlord/tenant law, have held criminal acts to be foreseeable even in the absence of prior similar incidents on the premises.⁴⁶ These decisions apply a less rigid standard of foreseeability, implying notice from the circumstances in general.⁴⁷ For instance, the United States Supreme Court held in *Lillie v. Thompson*⁴⁸ that the presence of a large number of vagrants within defendant's train station rendered attacks on individuals foreseeable.⁴⁹ The Court was not applying the law of any state; rather, recovery was afforded under the Federal Employers' Liability Act.⁵⁰ The decision in *Lillie*, therefore, can be distinguished because it rested on a *statutory* duty of employers to provide a safe place to work, and did not require recognition of a general duty in tort to provide adequate protection.⁵¹

In addition to expansion and definition of the scope of foreseeability, some jurisdictions have expanded upon the *Kline* rationale to increase the scope of duty in the commercial setting.⁵² The duty of protection was introduced into the commercial realm in *Samson v. Saginaw Professional Building*.⁵³ In *Samson*, the court determined that liability could be imposed upon the landlord for injuries to the plaintiff, who was attacked by a mental patient in an elevator.⁵⁴ (A portion of the premises was also leased to a state mental health clinic.) The court held that negligent conduct could be established in the absence of prior similar incidents if a landowner fails to investigate the risk and extent of the crime problem.⁵⁵ *Samson* can be distinguished from the inviter/invitee relationship considered here because the defendant was a commercial lessor, thereby invoking the landlord/tenant relationship. This distinction was emphasized in the court's discussion of the landlord's traditional duty over common areas of the building.⁵⁶ *Samson* is important, however, because it illustrates at least one court's willingness to abandon the prior similar incidents rule in favor of a "totality-of-the circumstances" approach. Furthermore, the analysis occurs in a quasi-commercial setting.

45. *Id.* at 86, 477 N.E.2d at 671.

46. See *Green Companies v. Divincenzo*, 432 So. 2d 86 (Fla. App. 1983) (holding that notice of reported crimes in the area, combined with an overall reduction in security, was sufficient to hold the landlord liable even with no history of prior crimes in the building). See also *Morris v. Barnette*, 553 So. 2d 648 (Tex. Civ. App. 1977) (holding that location, mode of business, observation, and past experience were sufficient notice to hold washateria operator liable). Note that the *Isaacs* court went even further than *Barnette*, because in *Isaacs*, the plaintiff did not present evidence on all four *Barnette* factors, yet the court nevertheless held the evidence sufficient to hold the landowner liable.

47. O'Donnell, *Landlord Liability for Crime to Florida Tenants—The New Duty to Protect from Foreseeable Attack*, 11 Fla. Sr. U.L. Rev. 979, 992 (1984). In *Morris v. Barnette*, 553 So. 2d 648, 650 (Tex. Civ. App. 1977), the court listed four modes available to prove the foreseeability of a third party's criminal conduct on the premises.

48. 332 U.S. 459 (1947).

49. *Id.* at 460–61 (citing Federal Employers' Liability Act, 45 U.S.C. § 51 (1983)).

50. *Id.* at 460.

51. *Id.*

52. Bazyler, *supra* note 18, at 743–44.

53. 393 Mich. 393, 224 N.W.2d 843 (1975). Although *Samson* did involve a landlord/tenant relationship, it was that of a commercial landlord leasing property for business purposes.

54. *Id.* at 398–99, 224 N.W.2d at 845.

55. *Id.* at 404–07, 224 N.W.2d at 848–49.

56. *Id.* at 407, 224 N.W.2d at 849.

III. OHIO LAW: BACKGROUND

There is not a great deal of Ohio law in the area of tort liability for the criminal acts of another. The Ohio Supreme Court has yet to determine the existence and extent of any duty of commercial landowners in this area, although several lower courts have confronted the issue.⁵⁷

In *Holdshoe v. Whinery*,⁵⁸ the Ohio Supreme Court first imposed liability upon a defendant for the conduct of a third person. In *Holdshoe*, the plaintiff patron was injured on defendant's picnic premises when an unattended automobile rolled down a hill and struck her.⁵⁹ The court held that the "[d]efendant, as an owner and occupier of land, . . . owes plaintiff a duty to use reasonable care to prevent the negligent acts of third parties which could harm the plaintiff where the defendant knows or should know that such acts are likely to occur."⁶⁰ After determining that plaintiff's status was that of a business invitee,⁶¹ the court premised the imposition of duty upon Section 344 of the Restatement.⁶² It is significant to note, however, that the court deleted any reference to accidental or intentional acts of third persons in its citation to Section 344.⁶³ Therefore, a narrow reading of *Holdshoe* suggests that a duty exists merely to guard against negligent and not criminal acts of third persons.⁶⁴ To date, the Ohio Supreme Court has not expressed an opinion as to whether Section 344 has been adopted in whole or in part.

The following year, the Ohio Supreme Court was faced with the issue of whether to further extend the developing third-party liability law. In *Howard v. Rogers*,⁶⁵ the plaintiff was accidentally injured when a fight broke out at a high school dance.⁶⁶ The supreme court, following *Holdshoe*, clearly recognized that an occupier of premises for business purposes⁶⁷ may be held liable for harm caused to a business invitee by the conduct of third persons.⁶⁸ The court nevertheless stressed that the landowner is "not an insurer of the safety of his business invitees while they are on those premises."⁶⁹ Hence, the landowner is not liable for an unknown danger which causes injury.⁷⁰ The decision of the trial court was reversed and judgment was rendered for

57. See, e.g., *supra* note 12.

58. 14 Ohio St. 2d 134, 237 N.E.2d 127 (1968).

59. *Id.* at 135, 237 N.E.2d at 128.

60. *Id.* at 138, 237 N.E.2d at 130 (emphasis added).

61. Note that Ohio still retains the traditional status classifications of trespasser, licensee, and business invitee for purposes of determining the landowner's duty of care. See, e.g., *DiGildo v. Caponi*, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969) (court postponed determining whether status categories should be abolished); *Moore v. Denune & Pipic, Inc.*, 26 Ohio St. 2d 125, 269 N.E.2d 599 (1971). See also *supra* note 15 and accompanying text.

62. See RESTATEMENT (SECOND) OF TORTS § 344 (1965).

63. *Holdshoe v. Whinery*, 14 Ohio St. 2d 134, 137, 237 N.E.2d 127, 129 (1968).

64. See *Daily v. K-Mart Corp.*, 9 Ohio Misc. 2d 1, 3, 458 N.E.2d 471, 473-74 (1981).

65. 19 Ohio St. 2d 42, 249 N.E.2d 804 (1969).

66. *Id.* at 43, 249 N.E.2d at 805.

67. One of the defendants held liable was a corporation doing business as Teensville, U.S.A. This defendant sponsored and conducted the dance for profit by charging an admission fee. Teensville, U.S.A. clearly was an occupier of the premises for business purposes. *Id.* at 46, 249 N.E.2d at 807.

It also appears (although it is unclear from the opinion) that the owners of the school gymnasium where the dance was held were also named defendants.

68. *Id.* at 46-47, 249 N.E.2d at 807.

69. *Id.* at 47, 249 N.E.2d at 807.

70. *Id.*, 249 N.E.2d at 807.

defendants because the likelihood of fighting at a teenage dance was deemed unforeseeable under the circumstances.⁷¹

The *Howard* court's failure to impose liability was premised upon lack of foreseeability;⁷² yet it is unclear to what extent the court intended to limit the scope of foreseeability. The confusion exists in light of the court's discussion of comment f to Section 344 of the Restatement,⁷³ which provides in part that no duty exists until the landowner "knows or has reason to know that the acts of the third person are about to occur."⁷⁴ A victim's recovery would be circumscribed to a degree even greater than that of the prior similar incidents rule if such a narrow reading of the *Howard* decision were adopted.⁷⁵ Support for this position can be gleaned from the court's failure to discuss the portion of comment f which relies on past experience as a means of assessing foreseeability.⁷⁶

However, the opinion suggests that the owners would have been liable if the probability of fights at teenage dances reasonably could have been foreseen.⁷⁷ The court stressed the absence of conduct at any other teenage dances in the area which would have alerted the defendant to the likelihood of such an occurrence.⁷⁸ Thus, the prior similar incidents rule, not whether the act was occurring or about to occur, served as an unarticulated measure of foreseeability.

Landowner liability for *criminal or intentional*⁷⁹ acts of third parties was first explored by the lower courts in *Townsley v. Cincinnati Gardens, Inc.*⁸⁰ In *Townsley*, the prior similar incidents rule was rigidly invoked, thus illustrating the court's reluctance to impose liability upon the landowner in the absence of very specific evidence serving to put the landowner on notice. Strict application of the doctrine foreclosed plaintiff's recovery for a physical assault which occurred in the washroom of the defendant's sports arena.⁸¹ Testimony at the trial level indicated that although

71. *Id.* at 48, 249 N.E.2d at 807.

72. *Id.* at 47-48, 249 N.E.2d at 807. The court stated, "In the instant case, there is no evidence from which reasonable minds could find that defendants either knew or in the exercise of ordinary care should have known of the likelihood of a fight such as occurred at this dance." *Id.*, 249 N.E.2d at 807.

73. See RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965). This comment provides:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. . . . If the place or character of his business, or his past experience is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to . . . afford a reasonable protection.

74. *Id.*

75. Several courts in jurisdictions outside of Ohio have adopted this limited duty rule. See, e.g., *Henley v. Pizitz Realty Co.*, 456 So. 2d 272, 277 (Ala. 1984) (evidence of prior similar incidents insufficient because such evidence did not show that defendant knew or had reason to know that the "acts [were] occurring or about to occur on the premises that pose[d] imminent probability of harm to an invitee."); *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556 (Miss. 1982); *Munn v. Hardee's Food Sys., Inc.*, 274 S.C. 529, 266 S.E.2d 414 (1980) (per curiam); *Compropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975); *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977) (patron could not recover for attack in defendant's store because defendant storeowner did not know and had no reason to know of criminal attack).

76. See *supra* note 73.

77. *Howard v. Rogers*, 19 Ohio St. 2d 42, 48, 249 N.E.2d 804, 807 (1969).

78. *Id.*, 249 N.E.2d at 807.

79. Again, it should be stressed that although lower courts in Ohio have addressed the issue, the Ohio Supreme Court has not ruled on the duty regarding criminal or intentional, as opposed to mere negligent, acts of third parties.

80. 39 Ohio Misc. 1, 314 N.E.2d 406 (1973), *rev'd*, 39 Ohio App. 2d 5, 314 N.E.2d 409 (1974).

81. 39 Ohio Misc. at 2, 314 N.E.2d at 407.

no incidents *exactly* like the one at issue had occurred, *similar* assaults on defendant's premises had taken place on previous occasions.⁸² The trial court ruled in plaintiff's favor, stating: "With the present state of the law and the current general threat of violent crime, establishments such as the defendant may have to add to their security forces to protect effectively their business invitees."⁸³

The court of appeals in *Townsley* rejected this approach and determined that a judgment against the owner was invalid in the absence of specific evidence demonstrating that the owner "knew or could have reasonably anticipated *that the area of attack* posed a danger to invitees."⁸⁴ The court recognized that prior instances of assault had occurred in the sports arena; however, there was no specific evidence of assaults in the washroom.⁸⁵ As a result, the trial court decision was overruled and no liability was imposed. The requirement of prior notice was narrowly interpreted by the court of appeals, which imposed a duty upon the landowner only when specific, rather than general, notice was afforded. The court also emphasized that the landowner may be required to increase security forces now that the owner has become aware of the potential for such an occurrence.⁸⁶

Finally, a 1981 trial level decision, *Daily v. K-Mart Corp.*,⁸⁷ provides a comprehensive overview of the development of Ohio law in this area. The plaintiff in this case was abducted and assaulted by two men at gunpoint from defendant K-Mart's parking lot.⁸⁸ The court ruled that the occurrence of "forty-nine separate incidents of serious crime"⁸⁹ in the ten years preceding this incident precluded summary judgment in favor of the defendant.⁹⁰ The presence of the earlier incidents alerted K-Mart to the possibility of future criminal conduct,⁹¹ and thereby gave rise to defendant's duty to protect invitees from such attacks. Accordingly, the appropriateness of defendant's actions in light of this duty was a question for the jury.⁹²

Ohio law, therefore, is in accord with the majority of American jurisdictions.⁹³ The existence of a landowner's duty to guard against criminal attack is recognized if such attack is foreseeable. The scope of the foreseeability doctrine in this area of law is defined by the prior similar incidents rule. In no Ohio case has a duty been imposed upon a landowner to guard against criminal attack in the absence of similar occurrences on the premises. The remaining sections of this Article will advocate the following refinements by the Ohio Supreme Court: (1) adoption of Section 344 of the

82. *Id.* at 3, 314 N.E.2d at 408.

83. *Id.* at 4, 314 N.E.2d at 409.

84. 39 Ohio App. 2d at 5, 314 N.E.2d at 409 (syllabus by the court) (emphasis added).

85. *Id.* at 8-9, 314 N.E.2d at 411.

86. *Id.* at 10, 314 N.E.2d at 412.

87. 9 Ohio Misc. 2d 1, 458 N.E.2d 471 (1981).

88. *Id.*, 458 N.E.2d at 472.

89. *Id.*, 458 N.E.2d at 472. The opinion does not indicate what acts constituted "serious crime"; therefore, no standard may be discerned regarding the degree of specificity required in implementing the prior similar incidents rule. The court's failure to address this specific versus general notice dichotomy may demonstrate a willingness on the court's part to construe the rule less restrictively than did the *Townsley* court.

90. *Id.* at 5, 458 N.E.2d at 476.

91. *Id.*, 458 N.E.2d at 476.

92. *Id.* at 6, 458 N.E.2d at 476.

93. See *supra* notes 5-6 and accompanying text.

Restatement in its entirety, thereby conclusively recognizing a landowner's duty to guard against criminal attack; and (2) abolition of any "per se" rule such as the prior similar incidents rule for determining the issue of foreseeability. Ohio can assess the strength of these proposals by examining their application in California, which has adopted a consistent approach.

IV. ANALYSIS OF THE "TOTALITY-OF-THE-CIRCUMSTANCES" APPROACH

A. California Abandons the Prior Similar Incidents Approach

A 1985 California Supreme Court decision rejected strict application of the prior similar incidents rule. In *Isaacs v. Huntington Memorial Hospital*,⁹⁴ the plaintiff, Dr. Isaacs, was shot and severely wounded by an unknown assailant on defendant's premises.⁹⁵ No prior similar assaults had occurred in the parking lot where the shooting took place; however, several threatened assaults and thefts had occurred in the emergency room area directly across the street.⁹⁶ In addition, the hospital was located in a high crime area, harassment was commonplace, and hospital security was inadequate.⁹⁷ The trial court granted the defendant's motion for a nonsuit on the grounds that the assault was not foreseeable without the occurrence of prior similar crimes in the same or similar portion of the premises.⁹⁸ On appeal, the state's highest court held that the absence of prior similar incidents did not foreclose Dr. Isaacs' action as a matter of law.⁹⁹ Although prior similar incidents are helpful, the court concluded that they are not essential to establish foreseeability.¹⁰⁰

Prior to the *Isaacs* case, the overwhelming majority of California appellate decisions strictly adhered to the prior similar incidents rule in several contexts, including the commercial landowner context.¹⁰¹ The California Supreme Court abandoned rigid application of the rule in *Isaacs*, citing four major reasons: (1) equating foreseeability of a particular act with previous occurrences of similar acts is erroneous;¹⁰² (2) the rule leads to arbitrary results and tenuous distinctions;¹⁰³ (3) strict application of the rule improperly removes too many cases from the jury's consideration;¹⁰⁴ and (4) the prior similar incidents rule undermines the policy of preventing future harm and the policy of victim compensation.¹⁰⁵ The court's reasons

94. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

95. *Id.* at 120, 695 P.2d at 655, 211 Cal. Rptr. at 358.

96. *Id.* at 121, 695 P.2d at 655-56, 211 Cal. Rptr. at 358.

97. *Id.* at 121, 695 P.2d at 655-56, 211 Cal. Rptr. at 358-59.

98. *Id.* at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360.

99. *Id.* at 131-32, 695 P.2d at 663, 211 Cal. Rptr. at 366.

100. *Id.* at 129, 695 P.2d at 661, 211 Cal. Rptr. at 364.

101. *See, e.g.,* *Anaya v. Turk*, 151 Cal. App. 3d 1092, 199 Cal. Rptr. 187 (1984); *Jubert v. Shalom Realty*, 135 Cal. App. 3d 1, 185 Cal. Rptr. 641 (1982); *Riley v. Marcus*, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827 (1981); *Wingard v. Safeway Stores, Inc.*, 123 Cal. App. 3d 37, 176 Cal. Rptr. 320 (1981); *Jamison v. Mark C. Bloome Co.*, 112 Cal. App. 3d 570, 169 Cal. Rptr. 399 (1980); *Totten v. More Oakland Residential Housing, Inc.*, 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1977); *Rogers v. Jones*, 56 Cal. App. 3d 346, 128 Cal. Rptr. 404 (1976) (all holding prior similar incidents are required to establish foreseeability).

102. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362.

103. *Id.* at 126, 695 P.2d at 658, 211 Cal. Rptr. at 361.

104. *Id.* at 126, 695 P.2d at 659, 211 Cal. Rptr. at 362.

105. *Id.* at 125, 695 P.2d at 658, 211 Cal. Rptr. at 362.

in departing from mechanical application of the blanket rule are sound, in light of public policy and established judicial principles. These four primary reasons underlying the court's decision can be consolidated into the following categories of judicial concern: (1) foreseeability is a flexible doctrine incapable of strict definition; (2) application of the rule usurps the historical function of the jury; and (3) the rule undermines important social and economic policies. An analysis of these considerations and the strength of the *Isaacs* "totality-of-the-circumstances" position follows.

B. Evaluation of the *Isaacs* Approach

1. *Foreseeability is a Flexible Doctrine Incapable of Strict Definition*

Foreseeability is a flexible doctrine that cannot be defined by a single standard such as the prior similar incidents rule. The concept of foreseeability is by its very nature a vague and nebulous principle. An "all-purpose" formula¹⁰⁶ as a means of distinguishing the foreseeable from the unforeseeable generally is not applicable to every instance. For example, although the occurrence of earlier criminal attacks late at night on a landowner's premises may render future attacks foreseeable, the occurrence of an attack in broad daylight with many patrons present may not subject the landowner to liability. Reasonable protection may permit reduced security during the "low-risk" hours; hence, the landowner may not be held to have breached a duty under such circumstances. Conversely, a "reasonable landowner" may have sufficient notice of the likelihood of attack from other factors even in the absence of prior similar attacks. The likelihood of criminal conduct may be anticipated by reason of location, mode of doing business, or observation of past experience.¹⁰⁷ In short, what is reasonably foreseeable is not always subject to strict quantification. The occurrence of prior similar incidents is not an exclusive means of placing a landowner on notice of the need to protect visitors from criminal attack. A more logical inquiry should focus upon the total factual setting of each case,¹⁰⁸ considering what actions a reasonable landowner would have taken to reduce the risk of criminal conduct under the circumstances.¹⁰⁹ Although actions which may or may not be considered "reasonable" are arguably no easier to define than foreseeability,¹¹⁰ at least the entire

106. Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1421 (1961). Professor Green, in his discussion of foreseeability as a determinant of liability in negligence cases, observes that "the reasonable man and his foreseeability" are fictions created to exemplify the jury's judgment in assessing the factual situation. *Id.* "Their conversion into an 'all-purpose' formula for determining the problem of responsibility in its totality must prove a vain attempt. It can not be sustained either as all inclusive or all exclusive over the broad area of negligence law." *Id.*

107. See *supra* note 4 and accompanying text. See also *supra* notes 46-47 and accompanying text.

108. Green, *supra* note 106, at 1417-20.

109. Bazzyler, *supra* note 18, at 752.

110. In fact, one commentator has observed that "[a]s a higher level of security becomes the norm, common perceptions of how much security is 'reasonable' will adjust." Zacharias, *supra* note 17, at 704. See also *Noble v. Los Angeles Dodgers, Inc.*, 168 Cal. App. 3d 912, 916-17, 214 Cal. Rptr. 395, 398 (1985) (court noted that a jury's evaluation of a landowner's security measures would only come into play once "the security in existence has already proven to be inadequate to prevent the injury which did occur."). Such observations may prompt criticism of the *Isaacs* approach by suggesting that higher standards will subject landowners to an impermissible risk of liability. The courts and

factual setting is before the jury. Thus, the absence of prior similar occurrences should not automatically defeat recovery by the plaintiff.

Such an analysis is particularly sound when compared with the analytical approach taken in *Rowland v. Christian*,¹¹¹ a 1968 decision of the California Supreme Court. Prior to the *Rowland* decision, a plaintiff's status as trespasser, licensee, or invitee precluded the noncommercial landowner from suit in some cases.¹¹² Under the traditional common law approach, the duty owed by a landowner to an individual differed depending on whether the court classified the plaintiff as a trespasser, licensee, or invitee.¹¹³ Thus, consequences to the landowner for an identical act or omission resulted in radically different outcomes merely as a result of the plaintiff's court-determined classification.¹¹⁴ The *Rowland* decision responded to this perceived inequity by eliminating the common law status distinctions and replacing them with a uniform standard of ordinary care.¹¹⁵

The *Rowland* approach in delineating duty in the broader context of general landowner liability is analogous to the duty-defining framework of the *Isaacs* court. Both courts undermined the application of strict doctrines of "per se" rules as duty-triggers. Just as the scope of a landowner's duty was defined by the plaintiff's status under pre-*Rowland* law,¹¹⁶ the prior similar incidents rule likewise prescribes the contours of a commercial landowner's liability by demarcating foreseeability. Each rule evolved to circumscribe the limits of a landowner's duty to persons entering the premises. By analogy, therefore, many of the problems with the status rule considered in the *Rowland* case are applicable to the prior similar incidents rule.¹¹⁷

In *Rowland*, the court rejected blind application of the general rule, and announced instead a balancing test to determine a landowner's duty irrespective of status.¹¹⁸ The court recognized that although a relationship generally exists between

legislatures, however, may implement other measures to guard against a legal rule which in effect makes the landowner an "insurer" of the patron's safety. See *infra* notes 239-41, 245-51 and accompanying text.

111. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

112. Comment, *The Death of Palsgraf: A Comment on the Current Status of the Duty Concept in California*, 16 SAN DIEGO L. REV. 793, 798 (1979).

113. The landowner's general duty to trespassers is stated in the RESTATEMENT (SECOND) OF TORTS, § 333' (1965). Subject to specified exception, the landowner is not liable to trespassers for his negligent failure to maintain the land in a reasonably safe condition; nor is he liable for his failure to exercise reasonable care in carrying out his activities. Thus, the landowner generally owed no duty to a trespasser at common law except to refrain from willful or wanton misconduct. J. PAGE, THE LAW OF PREMISES LIABILITY § 2.1, at 7 (1976 and Supp. 1985-86).

Section 342 of the Restatement specifies the landowner's duty to licensees. Landowners must either exercise reasonable care in order to make the premises safe, or warn the licensee of any unreasonably dangerous condition, if the licensee does not know or have reason to know of the risk involved. Furthermore, the landowner is required to exercise reasonable care in order to avoid injury to a known licensee. See *id.*, § 3.7, at 41.

As to invitees, the landowner owes a general duty of reasonable care to make the premises safe. *Id.*, § 4.5, at 72; RESTATEMENT (SECOND) OF TORTS, § 343 (1965).

114. J. PAGE, *supra* note 113, § 6.1 at 121-22.

115. 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968). See generally J. PAGE, *supra* note 113, § 6.3 at 123-24; Note, *Common Law Distinctions Between Licensee, Invitee, and Trespasser are Abolished in California and Replaced by a Standard of Ordinary Care*, 14 VILL. L. REV. 360 (1969). "[Rowland v. Christian] is the first case to abolish completely the common law distinctions." *Id.* at 362.

116. See *supra* text accompanying note 113.

117. See generally Bazylar, *supra* note 18, at 738-39.

118. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

status and duty, status was *not determinative* of duty in all cases.¹¹⁹ For instance, "although foreseeability of harm to an invitee would ordinarily seem greater than foreseeability of harm to a trespasser, in a particular case the opposite may be true."¹²⁰ Similarly, notice of prior similar incidents certainly has some bearing on the issue of foreseeability, although the occurrence of such acts on the landowner's premises should not be determinative. The rules were intended to provide guidelines for flexible concepts such as duty and foreseeability; they should not be applied to preclude considerations¹²¹ which are essential to a proper resolution of the issues.¹²²

Proponents of continued reliance on established rules of status have attacked the *Rowland* decision on the ground that elimination of the status classification results in determining duty on a case-by-case basis.¹²³ The dissent in *Rowland* stressed the value of judicial certainty provided by the black-letter rules.¹²⁴ Justice Burke opposed abandonment of the status classifications, arguing that the blanket categories with their corresponding duties provided the courts with an established and workable approach.¹²⁵ Under the majority's singular standard of care, fact-specific determinations of liability without the benefit of prescribed standards or guidelines would replace the "predictable" structure. Therefore, an argument in favor of retaining the prior similar incidents rule submits that the rule performs a valuable function by providing a stable set of guidelines to determine foreseeability.¹²⁶

However, any such mechanical theory of jurisprudence is inherently flawed. A rigid limitation on the type of evidence permitted to establish foreseeability fosters strained construction of the rule by the courts.¹²⁷ The courts enjoy a great degree of latitude in either narrowing or broadening the application of the rule's criteria in order to arrive at a result consistent with the perceived equities in a particular case.¹²⁸ The introduction of evidence other than prior similar incidents will relieve courts of the

119. *Id.*, 443 P.2d at 568, 70 Cal. Rptr. at 104.

120. *Id.* at 117-18, 443 P.2d at 567, 70 Cal. Rptr. at 103.

121. The *Rowland* court discussed a number of considerations including the closeness of the connection between defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, foreseeability of harm, etc.

122. 69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

123. *Id.* at 120, 443 P.2d at 569, 70 Cal. Rptr. at 105 (Burke, J., dissenting).

124. Note, *supra* note 115, at 365 (citing *Rowland v. Christian*, 69 Cal. 2d at 120, 443 P.2d at 569, 70 Cal. Rptr. at 105 (Burke, J., dissenting)).

125. Note, *supra* note 115, at 365.

126. Although at first glance, there does appear to be some merit to this argument, one need only examine the great disparity with which the prior similar incidents rule has been applied to determine that the argument is without merit. See *supra* note 7. Courts have gone to considerable lengths to determine how "similar" the prior occurrences must be in order to invoke the prior similar incidents rule. *Id.* See *infra* text accompanying notes 127-29.

127. See *supra* note 7.

128. *Id.* The arbitrary effect of the prior similar incidents rule is illustrated by *Taylor v. Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981). In *Taylor*, the court adopted the view that a landowner's knowledge of crimes against property does not give rise to the duty to protect against physical attack. Thus, application of the rule disregards any notice the defendant may have received which should have alerted him to the potential for criminal conduct. If enough crimes against property are committed, a reasonable landowner would be apprised of the need to implement some type of security. The prior similar incidents rule can be criticized because "the reasonable business inviter's response to a rash of property crimes may effectively prevent the occurrence of crimes against the person as well." Comment, *supra* note 5, at 906. See also Note, *Foster v. Winston-Salem Joint Venture: Duty of Mall Owners to Take Measures to Protect Invitee From Criminal Acts*, 60 N.C. L. REV. 1126, 1138 (1982) ("Even if the facts had indicated that a patron's property was the only interest threatened by defendant's alleged negligence, the fact that a different interest of the plaintiff was actually injured should not allow an exculpation from liability.").

difficult task of finding qualifications and exceptions to the rule, therefore eliminating the tenuous qualitative and quantitative distinctions which have impeded forthright judicial decisionmaking.¹²⁹

2. *The Totality-of-the-Circumstances Approach Preserves the Historical Function of the Jury*

Another important line of reasoning articulated in *Isaacs* reflects current California judicial thought regarding the jury's role in assessing foreseeability. In *Weirum v. R.K.O. General, Inc.*,¹³⁰ foreseeability was held to be a question of fact for the jury.¹³¹ The court may decide foreseeability only if reasonable minds cannot differ on undisputed facts.¹³² The effect of the *Weirum* decision and its progeny¹³³ is to limit the judge's authority to rule in defendant's favor on summary proceedings.¹³⁴ Ohio case law follows this general approach, consistently determining that resolution of the foreseeability issue lies with the jury.¹³⁵

The *Isaacs* court's reasoning is supported by a recognition of the historical function of the jury in general. Questions of fact are the jury's domain.¹³⁶ "Fact" includes a determination of specific standards of conduct for the parties under the circumstances of the actual case.¹³⁷ "The cardinal concept is that of the reasonably prudent man under the circumstances; what he would have observed; what dangers he would have perceived; what he would have done; and the like."¹³⁸ Although outer limits have been set by courts to control somewhat the scope of the jury's latitude, courts traditionally have applied fixed judicial standards with restraint.¹³⁹

The jury as a "trier of fact" introduces the common sense of the "ordinary man" into fact-finding.¹⁴⁰ One notable role played by the jury is to "keep administration of the law in accord with the wishes and feelings of the community" by "introduc[ing] into their verdict a certain amount . . . of popular prejudice."¹⁴¹

129. Note, *supra* note 115, at 367.

130. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

131. *Id.* at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471.

132. *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983).

133. *See, e.g.*, *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978); *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

134. Comment, *supra* note 112, at 804.

135. *See, e.g.*, *Strother v. Hutchinson*, 67 Ohio St. 2d 282, 423 N.E.2d 467 (1981); *Clinger v. Duncan*, 166 Ohio St. 216, 141 N.E.2d 156 (1957); *Marks v. Wagner*, 52 Ohio App. 2d 320, 370 N.E.2d 480 (1977).

136. James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 667-68 (1949) (author observes that "questions of law are for the court and questions of fact are for the jury," but notes the critical role that the court plays in shaping what evidence is to be admitted in trial. *Id.* at 667-69); W. PROSSER & P. KEETON, *supra* note 2, §45, at 321 ("[I]n any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, . . . the question is for the jury. . . .").

137. James, *supra* note 136, at 676.

138. *Id.*

139. *Id.* at 677.

140. *Id.* at 685.

141. O.W. HOLMES, *COLLECTED LEGAL PAPERS*, 237-38 (1921). Holmes, although questioning the jury's right to decide appropriate standards of conduct as a theoretical matter, *see id.* at 236-37, nevertheless justifies the system because of this very phenomenon: the jury's tendency to keep the law in accord with social needs. *See also* James, *supra* note 136, at 686.

This important function of the jury implicitly serves as the basis for Professor Zacharias' political model of torts. *See generally* Zacharias, *supra* note 17. Zacharias has articulated a theory which posits that judicial rules of liability evolve

Strict application of rigid rules, such as the prior similar incidents rule, restricts the jury's sphere by limiting the degree of latitude which is acceptable in deciding questions of fact.¹⁴² The effect of this restriction is to limit liability overall.¹⁴³ Conversely, the absence of specific court-prescribed standards operates to enlarge the jury's role in assessing the defendant's conduct. As a result, the general scope of liability tends to be extended.¹⁴⁴ The restrained liability fostered by the prior similar incidents rule carries the negative consequences of preventing the jury from performing one of its valuable functions, that of keeping the law receptive to changing social needs.¹⁴⁵

Enlarging the degree of the jury's participation in evaluating foreseeability has been criticized. One such objection highlights the problem of sympathetic juries.¹⁴⁶ In this context, jurors are particularly likely to side with the plaintiff. Although the appropriate vehicle for vindication of the victim's injury more properly lies with the criminal system, redress under the penal laws is extremely unlikely.¹⁴⁷ Hence, a practical problem inherent in civil actions against landowners for failure to take reasonable security measures is that the person who is directly responsible for the plaintiff's harm is not a party to the action.¹⁴⁸ Although the landowner is not directly responsible for the plaintiff's injury, it is easy for jurors to hold the landowner accountable by shifting the risk of loss away from the innocent victim.¹⁴⁹ Juror hostility toward the criminal, frustration with the imperfections in the criminal justice system, and empathy with the victim are all factors which may play a role in jury verdicts favoring liability.¹⁵⁰ Finally, commercial defendants are likely to be perceived as economically better able to bear the loss than are individuals. This perception of the landowner as a "deep pocket" only serves to exacerbate the problem of jury sympathy.¹⁵¹

However, the impact of jury sympathy in this area may be overemphasized. There is no evidence to suggest that courts are less equipped to deal with the possibility of bias in this context than in any other. The use of directed verdicts, judgment n.o.v.'s, special interrogatories, and concise jury instructions can reduce inequitable outcomes.¹⁵² Moreover, intimation that jurors are untrustworthy

in response to the pressures highlighted by a particular social problem. When compensation for a perceived social wrong is inadequate, victims pressure courts for redress. *Id.* at 715-27. Under Zacharias' theory, ultimate resolution of the issue may require legislative intervention. The liability rule therefore may be justified as an attempt to provoke this legislative response. Thus, the jury may serve to alert the judiciary (and as a consequence, the legislature) to social needs.

142. James, *supra* note 136, at 678.

143. *Id.* at 688-89.

144. *Id.*

145. *Id.* at 689. See *supra* text accompanying notes 140-41.

146. See, e.g., Browder, *supra* note 2, at 153; Fager, *Liability of Business Proprietors for Criminal Acts of Third Persons*, 29 FED. INS. COUNS. Q. 29, 33 (1978); Zacharias, *supra* note 17, at 712; Bazzyler, *supra* note 18, at 753.

147. In most cases, the identity of the assailant is unknown.

148. Fager, *supra* note 146, at 33.

149. Browder, *supra* note 2, at 153.

150. See Fager, *supra* note 146, at 33; Zacharias, *supra* note 17, at 713 n.93.

151. Zacharias, *supra* note 17, at 712, 713 n.93.

152. Bazzyler, *supra* note 18, at 753. See also James, *supra* note 136, at 680-81 ("the law places principal reliance upon the court's instructions to keep the jury within their theoretical bounds"). However, Professor James astutely observes that "the instruction is an effective device only to the extent that it is actually followed by the jury." *Id.*

decisionmakers is inconsistent with the use of the jury system in general.¹⁵³ Finally, other measures exist to eliminate the possibility of adverse consequences in extending liability.¹⁵⁴ On balance, legal, social, and economic policy considerations suggest that society's overall interests are best served by requiring landowners to guard against criminal attack.

3. *The Totality-of-the-Circumstances Approach Advances Important Social and Economic Policies*

The ultimate effect of the *Isaacs* rule is to increase the risk of landowner liability for failure to guard against criminal attack. In determining that prior similar incidents are not essential to establish foreseeability,¹⁵⁵ the *Isaacs* court created greater opportunities for the jury to determine the reasonableness of the security measures employed by the landowner. As discussed earlier, when the jury's role in evaluating the defendant's conduct is enlarged, the general scope of liability tends to be extended.¹⁵⁶ The following discussion of the policy implications generated by extending landowner liability illustrates the merit of the totality-of-the-circumstances approach.

a. *The Pervasiveness of the Crime Problem and the Landowner's Role in Crime Prevention*

Violent criminal attacks, especially prevalent in areas of high population concentration, pose a serious social problem.¹⁵⁷ Businesses and commercial establishments constitute a particular source of victimization.¹⁵⁸ The problem persists, despite law enforcement efforts and increased victim awareness.¹⁵⁹ Many commentators suggest that the lack of adequate security exacerbates the crime problem.¹⁶⁰ Thus, one means of reducing the crime problem is to impose a legal duty on landowners to provide protection against foreseeable attack.¹⁶¹

Minimizing the opportunity for criminal attack is an effective approach which should be utilized to prevent crime.¹⁶² The commercial landowner can implement a

153. No attempt is made here to argue the merits of the jury system; our current structure has strong opponents as well as proponents. Clearly, though, the existence of the system supports the notion that the jury serves a valuable function in our current legal system. See *supra* notes 136-45 and accompanying text.

154. See *infra* notes 245-51 and accompanying text.

155. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985).

156. See *supra* note 145 and accompanying text.

157. See C. JEFFREY, CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN 215 (1971); W. SKOGAN & M. MAXFIELD, COPING WITH CRIME 28 (1981); Bazylar, *supra* note 18, at 727 (citing J. CONKLIN, THE IMPACT OF CRIME 3, 41 (1975)); Zacharias, *supra* note 17, at 735.

158. See Bazylar, *supra* note 18, at 727-28 and sources cited therein; C. JEFFREY, *supra* note 157, at 214-15.

159. See generally U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1984 at 181-83; W. SKOGAN & M. MAXFIELD, *supra* note 157, at 11.

160. Bazylar, *supra* note 18, at 730 (citing W. CLIFFORD, PLANNING CRIME PREVENTION 26 (1976)); Comment, *supra* note 5, at 902 and sources cited therein; NATIONAL CRIME PREVENTION INSTITUTE, UNDERSTANDING CRIME PREVENTION 3-7 (1986).

161. See generally Bazylar, *supra* note 18, at 728; Zacharias, *supra* note 17; Comment, *supra* note 5.

162. NATIONAL CRIME PREVENTION INSTITUTE, *supra* note 160, at 3; R.L. O'BLOCK, SECURITY AND CRIME PREVENTION 302-05 (1981); Bazylar, *supra* note 18, at 733.

variety of inexpensive measures to eliminate conditions which provide opportunity for successful criminal attack. For instance, the landowner can eradicate target areas such as dark, unattended parking lots by increasing lighting and surveillance measures.¹⁶³ Dial-free emergency phones can be installed to increase the probability of effective apprehension by police.¹⁶⁴ The landowner can remove objects which conceal attackers, such as bushes or trees.¹⁶⁵ He can also reduce physical barriers to visibility in general by positioning key areas of access as far away from isolated areas as possible.¹⁶⁶ Such tactics enhance the likelihood of arrest; thus, a landowner can deter crime by incorporating strategies which make his premises unattractive or unprofitable to the criminal.¹⁶⁷

b. Cost-Benefit Analysis

An economic cost-benefit analysis justifies the landowner's duty to guard against criminal attack. Under this approach, legal liability is warranted when the expected costs of failing to adopt security measures outweigh the burden of taking the precaution.¹⁶⁸ The expected costs are determined by evaluating the dollar magnitude of the potential loss (i.e., the amount the landowner would be required to pay in victim compensation) multiplied by the probability of criminal attack.¹⁶⁹ It is only when this sum is greater than the cost of precautions necessary to guard against this risk that imposition of liability is justified.¹⁷⁰ Thus, economic efficiency will dictate when the imposition of a legal duty will be warranted; recognition of a duty is necessary when forces in the private marketplace do not promote optimal safety precautions.¹⁷¹

In allocating losses resulting from failure to implement reasonable security measures, economic theory posits that the party who is best able to prevent the loss should bear the consequences of his failure to do so.¹⁷² Utilizing a pragmatic approach, it is apparent that the landowner is in the best position to prevent attacks. The owner has access to more information about the crime problem than does any individual.¹⁷³ Moreover, as a commercial proprietor, she is best able to accurately assess relative costs and benefits of proposed security measures.¹⁷⁴ Patrons of commercial establishments are likely to be relatively uninformed of the extent of the

163. NATIONAL CRIME PREVENTION INSTITUTE, *supra* note 160, at 113-14; R.L. O'BLOCK, *supra* note 162, at 314-17.

164. NATIONAL CRIME PREVENTION INSTITUTE, *supra* note 160, at 127.

165. *Id.* at 113-14.

166. *Id.* at 122.

167. *Id.* at 3.

168. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 147-48 (3d ed. 1986).

169. *Id.* at 147.

170. *Id.* at 148. This formula prescribes the level of optimal accident avoidance and reflects Learned Hand's classic analysis: "[T]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) The probability [of harm]; (2) the gravity of the resulting injury . . . ; (3) the burden of adequate precautions." U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

171. Zacharias, *supra* note 17, at 703-04, 707. See Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972).

172. G. CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970); Note, *supra* note 128, at 1135.

173. Calabresi & Melamed, *supra* note 171, at 1096; Note, *supra* note 128, at 1134-35; Zacharias, *supra* note 17, at 705-06.

174. Calabresi & Melamed, *supra* note 171, at 1096-97; see also Zacharias, *supra* note 17, at 705-06.

crime problem.¹⁷⁵ Even though media accounts of victim attacks are frequently disseminated, an occasional or one-time patron unfamiliar with the locale may be completely unaware of the pervasiveness of the problem. Even local patrons will most likely possess only a general awareness of hazardous conditions.¹⁷⁶ A landowner, on the other hand, will be apprised of very specific details regarding the type of criminal activity on or near her premises.¹⁷⁷ More significant than the landowner's access to information, however, is the fact that the landowner is uniquely situated to implement security measures on a premises-wide basis. In exercising control over the land, the possessor is better able to effectively combat the threat of attack.¹⁷⁸ The landowner can install additional security devices, employ security guards, or adopt alternative modes of operation in order to deter crime.¹⁷⁹ Conversely, individual patrons possess only a limited range of choices available to minimize their exposure to attack.¹⁸⁰

The single most effective choice available to the patron is to simply remain at home.¹⁸¹ In most instances, this is neither a desirable nor feasible means of combatting the problem. An individual's fear-motivated refusal to go out at night is not an effective means of deterring crime.¹⁸²

Of course, customers may always refuse to shop at establishments which pose a particularly apparent risk of criminal attack.¹⁸³ Ideally, fewer customers will patronize businesses which have inadequate security, opting instead to frequent establishments which employ superior security tactics. The decline in patronage experienced by a negligent landowner will generate higher prices for his goods;¹⁸⁴ as prices increase, the demand for his products will decline.¹⁸⁵ Consequently, enterprises failing to provide security will be forced to adopt precautionary measures or will eventually be driven out of business.¹⁸⁶ Market theory in its pure form thereby suggests that judicial intervention in the form of a legal duty is unwarranted.¹⁸⁷ However, two significant distinctions must be drawn. First, the market theory

175. Bazzyler, *supra* note 18, at 745-46; Calabresi & Melamed, *supra* note 171, at 1096 ("In the absence of certainty as to whether a benefit is worth its costs to society, . . . the cost should be put on the party *best located to make such a cost benefit analysis.*") (emphasis added); Zacharias, *supra* note 17, at 706; Note, *supra* note 128, at 1135.

176. Zacharias, *supra* note 17, at 706.

177. *Id.* at 745 ("Storeowners have superior knowledge of specific dangers near specific stores . . ."); Bazzyler, *supra* note 18, at 746.

178. Bazzyler, *supra* note 18, at 741; Zacharias, *supra* note 17, at 745.

179. Bazzyler, *supra* note 18, at 748. See *supra* notes 162-67 and accompanying text.

180. Individuals can always carry whistles, mace, or other repellants to protect themselves. They can also refuse to walk alone at night. These measures should be encouraged; however, they are not adequate in and of themselves. Moreover, individuals may attempt to carry weapons to ward off the threat of successful criminal attack. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 159, at 182-83 (11% of those surveyed carried a weapon as a crime prevention measure). Leaving the burden of crime prevention solely on individual patrons may have undesirable consequences; if individuals are forced to resort to self-help measures of this kind, the crime rate may actually increase.

181. Bazzyler, *supra* note 18, at 747-48.

182. *Id.*; W. SKOGAN & M. MAXFIELD, *supra* note 157, at 48-49; Zacharias, *supra* note 17, at 735.

183. Zacharias, *supra* note 17, at 745.

184. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 669 (1985); see generally G. CALABRESI, *supra* note 172.

185. Owen, *supra* note 184, at 669.

186. *Id.*

187. *Id.* See also Zacharias, *supra* note 17, at 703-04.

assumes adequate consumer information.¹⁸⁸ As discussed previously, consumers simply may not possess a level of information sufficient to make discriminating choices.¹⁸⁹ Second, and more importantly, the market theory assumes that individuals do indeed have a meaningful choice to shop elsewhere. Individuals living in high-crime neighborhoods may be faced with the choice of shopping at two or more neighborhood establishments, each of which poses an equal degree of risk. It is unrealistic to expect individuals of limited means and mobility¹⁹⁰ to travel a significant distance to shop at a more security-conscious establishment. From a practical standpoint, the cost of travel, in terms of both time and expense, is likely to outweigh the benefits to an individual residing in a high-crime area. Clearly, society's cost in imposing the burden on individuals, rather than landowners, is significant.¹⁹¹ Since the market mechanism for eliminating high-risk establishments is unlikely to be effective under these circumstances, judicial intervention is warranted.¹⁹²

Economic analysis also supports imposing a duty on landowners to guard against criminal attack for two additional reasons. First, the losses resulting from criminal attack on a landowner's premises should be allocated to the category of people who are best able to insure against such losses.¹⁹³ Landowners, engaged in commercial operations for profit, clearly are best suited to insure. Landowners are better able to widely disperse the cost of security and insurance.¹⁹⁴ Hence, the cost of crime is allocated pro rata among the broad class of potential victims, the patrons, instead of among a select class of individuals, the actual victims of attack.¹⁹⁵

Second, economic theory allocates burdens on those who are in a position to pass along part of the cost to purchasers.¹⁹⁶ Again, landowners are uniquely situated to distribute costs in this manner.¹⁹⁷ Loss allocation on this basis is sound in one respect: patrons who benefit from products or services should be required to pay the costs necessary in making the goods or services available.¹⁹⁸ However, passing the costs of the duty on to the patron can be devastating in some instances. Since the crime problem is more severe in urban areas,¹⁹⁹ individuals forced to live in these high-crime areas are most in need of crime-detering measures. These patrons in general are least able to afford the cost of increased security.²⁰⁰ Prohibitive costs may

188. Calabresi & Melamed, *supra* note 171, at 1094-95; Zacharias, *supra* note 17, at 705.

189. See *supra* note 175-77 and accompanying text.

190. Zacharias, *supra* note 17, at 745 (shoppers may not be as mobile as functional analysis assumes).

191. See Bazylar, *supra* note 18, at 747-50; Note, *supra* note 128, at 1135.

192. Zacharias, *supra* note 17, at 707.

193. G. CALABRESI, *supra* note 172, at 50-51.

194. Zacharias, *supra* note 17, at 745.

195. *Id.* at 704; Note, *supra* note 128, at 1135.

196. G. CALABRESI, *supra* note 172, at 50-51.

197. See Zacharias, *supra* note 17, at 704; Comment, *supra* note 5, at 907-08; Note, *supra* note 128, at 1135.

198. Owen, *supra* note 184, at 670.

199. See *supra* note 157 and accompanying text.

200. Zacharias, *supra* note 17, at 705. See also *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 591, 186 A.2d 291, 298 (1962) (In rejecting proposed duty to provide police protection, court observed that the increased cost will be passed along to tenants in the housing authority. The court stated that "[t]he burden should be upon the whole community and not upon the segment of the citizenry which is least able to bear it.").

eliminate marginally profitable businesses from these areas.²⁰¹ Moreover, low-income patrons should not be forced to choose between absorbing the cost of security or risking the loss of local availability of goods and services. In response to this compelling argument, several commentators have observed that the public sector will be forced to take increased action if forces in the marketplace drive merchants out of high-crime areas.²⁰² Furthermore, the proposed liability on the landowner is not absolute; landowners will be held accountable for failure to implement reasonable security measures, most of which do not involve debilitating operating costs.²⁰³ Liability will not be imposed for the failure to eliminate the risk of crime altogether.²⁰⁴

c. "Fairness" Analysis

Imposing a duty to guard against criminal attack has been criticized on principles of fairness by the Supreme Court of New Jersey in *Goldberg v. Housing Authority of Newark*.²⁰⁵ In *Goldberg*, the plaintiff was beaten and robbed while delivering milk to a tenant at defendant's housing project.²⁰⁶ The New Jersey Supreme Court found no duty to provide police protection²⁰⁷ based on an analysis of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.²⁰⁸ The court rejected an analysis which would turn on the issue of foreseeability and instead relied on evaluating the *fairness* of the proposed duty.²⁰⁹ In concluding that the imposition of a duty would be unfair, the court focused on the vagueness of both the duty and the standard of performance.²¹⁰ This argument, however, does not justify a refusal to recognize a landowner's duty to guard against criminal attack. Once a duty is clearly recognized, community standards will evolve to reduce the degree of

201. Zacharias, *supra* note 17, at 705; Comment, *supra* note 5, at 907-09.

202. *Id.*

203. See *supra* notes 162-67, 191 and accompanying text.

204. See *Miles v. Flor-Line Assoc.*, 442 So. 2d 584 (La. App. 1983) (recognizing that mere occurrence of crime does not result in finding a breach of landowner's duty to provide reasonable protection where adequate security measures had been taken). See also *infra* notes 245-47 and accompanying text.

205. 38 N.J. 578, 186 A.2d 291 (1962).

206. *Id.*, 186 A.2d 291.

207. Note that the *Goldberg* court was asked to recognize a duty to provide police protection, which must be distinguished from the duty to provide security. The duty to provide police protection raises a host of policy considerations distinct from those raised here. Such concerns include the statutory nature of the power vested in the government to establish a police force, and the highly specialized nature of the police function. *Id.* at 587, 186 A.2d at 296.

208. *Id.* at 581, 186 A.2d at 293.

209. *Id.*, 186 A.2d at 293.

210. *Id.* at 588, 186 A.2d at 297. "Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and psychotic?" *Id.*, 186 A.2d at 297.

In support of the *Goldberg* court's vagueness rationale, the Supreme Court of Tennessee has also stated, "While it may not seem unfair in the light of public sentiment and social policy in Washington, D.C. to impose upon landlords the duty of protecting against criminal acts, in our opinion it is patently unfair and unjust to impose the vague duty of Section 344 Restatement of Torts (Second) on the shopkeepers and merchants of Tennessee, . . . for the sudden criminal acts of unknown and unidentified persons." *Cornpross v. Sloan*, 528 S.W.2d 188, 195 (Tenn. 1975). The *Cornpross* court went on to hold that the occurrence of prior similar incidents is not sufficient to give rise to the duty; rather, the landowner must be aware that criminal acts are occurring or are about to occur prior to imposing liability. See *supra* note 75.

uncertainty.²¹¹ Moreover, explicit guidelines can be formulated, either in judicial decisions or by legislative pronouncement,²¹² to further clarify what measures will satisfy the duty.

Critics also argue that imposing liability for inadequate security is unfair because private parties are required to guard against actions beyond their control.²¹³ This criticism fails to acknowledge that societal interests play an important role in shaping legal policy. The imposition of a legal duty may be justified by social considerations which influence loss allocation;²¹⁴ for instance, *Rowland v. Christian*²¹⁵ sets forth a number of considerations which must be evaluated in determining whether a particular duty should be imposed.²¹⁶ Most notable among these factors is the policy of preventing future harm and the consequences to the community that a liability rule would generate.²¹⁷ A legal rule which requires landowners to guard against criminal attack, although imperfect in some respects, best advances societal goals.²¹⁸

For example, the totality-of-the-circumstances approach promotes valuable societal objectives by encouraging the implementation of security measures. If the occurrence of a prior similar incident is necessary before the duty arises, the landowner will have no incentive to provide security until such an attack occurs. In essence, the landowner will receive the benefit of "one free attack."²¹⁹ A failure to extend the duty to landowners would therefore abrogate society's interest in preventing future harm by discouraging voluntary security practices.²²⁰ Imposition of the duty provides an incentive to landowners to help minimize the crime problem.²²¹ Without such a duty, a conscientious landowner who voluntarily elects to adopt security measures may subject himself to a risk of liability greater than that of a landowner who implements no security measures whatsoever.²²² By voluntarily undertaking the duty, a landowner may be held liable for failure to properly carry out the undertaking on much the same theory as one is held liable for negligently undertaking to rescue.²²³ Recognition of the duty alleviates the paradoxical outcome fostered by a sweeping rule of no liability. Finally, the incentive to reduce the crime problem also answers any argument based on the patron's assumption of the risk. One

211. See, e.g., Zacharias, *supra* note 17, at 741 (liability rule would "decrease the ambiguity of the current law by providing a norm, or prescription of appropriate conduct"); Comment, *supra* note 5, at 909-10.

212. See *infra* note 248 and accompanying text.

213. See, e.g., *Compropt v. Sloan*, 528 S.W.2d 188, 195 (Tenn. 1975); Comment, *supra* note 5, at 889.

214. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); See *supra* notes 121-22 and accompanying text.

215. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

216. *Id.* at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

217. *Id.*, 443 P.2d at 564, 70 Cal. Rptr. at 100.

218. The use of tort-imposed rules of duty to remedy societal goals has recently come under attack by advocates of tort-reform. One commentator has observed that "[t]he California Supreme Court has arguably pushed tort law past its ability to solve social problems in a variety of contexts." Owens, *supra* note 184, at 675 n.50 (citing authority).

219. Comment, *supra* note 5, at 905.

220. *Id.*; Zacharias, *supra* note 17, at 740.

221. *Id.*

222. Zacharias, *supra* note 17, at 741.

223. *Id.* See also W. PROSSER & P. KEETON, *supra* note 2, §56, at 378 (Even in the absence of a duty, "if the defendant does attempt to aid him, . . . he is regarded as entering voluntarily into a relation which is attended with responsibility. . . . Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interest.").

such argument reasons that a landowner located in a high-crime area should not be forced to make his premises safer than surrounding areas.²²⁴ If the patron knows that the level of crime in a community is high, it is argued, no liability should attach because the patron has assumed the risk of attack merely in venturing out.²²⁵ Such a rule is unacceptable because it adopts an intolerable degree of apathy by refusing to deal with the crime problem. A landowner should not be relieved of the duty to improve the safety of his premises simply because surrounding premises are also unsafe.

The nature of the business inviter/invitee relationship further undermines the persuasiveness of criticisms on the grounds of fairness. First, the commercial landowner is deriving benefit from the patron's presence at his establishment.²²⁶ In return, an individual expects some minimal degree of protection once the owner's invitation to enter the establishment is accepted.²²⁷ Second, the *Isaacs* decision notes that commercial establishments, by their very nature, attract crime.²²⁸ In maintaining premises that attract crime, it cannot be said that the landowner has done nothing "wrong" such that the imposition of liability is unjustified.²²⁹ In fact, even courts which have adopted an extremely restrictive view of the landowner's duty to guard against criminal attack have implicitly premised their view on the assumption that the landowner has done nothing to create a risk of attack.²³⁰ Thus, liability may be justified even under this narrow view if the landowner's failure to provide security "attracts or provides a climate for crime."²³¹

A final attack centers upon the proper function of private enterprises in preventing crime. The *Goldberg* analysis justifiably recognizes that some crimes will be committed notwithstanding the adequacy of the landowner's protection.²³² In effect, the burden of guarding against criminal attack is shifted away from the victim and the government, and instead placed on the landowner. This result has been challenged as placing the responsibility for crime prevention on landowners who are no better able than the police to bear such a burden.²³³ However, this line of reasoning again attempts to ignore the severity of community crime. The need for cooperative efforts among citizens, businesses, and government cannot be over-

224. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 647, 281 S.E.2d 36, 43 (1981) (Carlton, J., dissenting).

225. *Id.*, 281 S.E.2d at 43.

226. Bazylar, *supra* note 18, at 741; Zacharias, *supra* note 17, at 709.

227. Bazylar, *supra* note 18, at 746.

228. 38 Cal. 3d at 129, 695 P.2d at 661, 211 Cal. Rptr. at 364 ("In the very operation of an allnight convenience store, defendants may be said to have created an 'especial temptation and opportunity for criminal misconduct,' thus increasing the foreseeability of injury resulting from third party misconduct. . . .") (citations omitted).

229. See RESTATEMENT (SECOND) OF TORTS, § 302 comment n (1965) (liability may be warranted for creating a "situation or temptation to third persons to commit more serious forms of misconduct"); Zacharias, *supra* note 17, at 707-09, 745; Note, *supra* note 128, at 1134-35.

230. See, e.g., *Compropt v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975) ("There is no duty upon the owners or operators of a shopping center, individually or collectively, or upon merchants and shopkeepers generally, whose mode of operation of their premises *does not attract or provide a climate for crime*, to guard against the criminal acts of a third party") (emphasis added).

231. *Id.*

232. *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 588, 186 A.2d 291, 297 (1962) ("The topic presupposes that inevitably crimes will be committed notwithstanding the sufficiency of the force.").

233. See Zacharias, *supra* note 17, at 708; Comment, *supra* note 5, at 889.

looked. The responsibility for crime protection lies with all members of the community, the private as well as the public sector.²³⁴ Commercial proprietors should not be absolved of this duty simply because they alone cannot prevent the risk of criminal attack altogether. Community-wide efforts are essential to make strides toward a "more secure collective physical environment."²³⁵ The minimal burden that a duty to provide protection imposes on the landowner is far outweighed by the value to society of imposing it.²³⁶

d. Legal Concerns

The most significant challenge to adopting a totality-of-the-circumstances approach lies with the fear of unlimited landowner liability. This criticism is premised upon the jury's perceived tendency to compensate the innocent victim of a criminal attack.²³⁷ In addition to the traditional checks in the judicial system,²³⁸ adequate restraining factors are present in the cause of action itself to prevent landowner liability for the mere occurrence of an attack. In particular, the element of causation²³⁹ poses a significant barrier to the risk of unlimited landowner liability. Even if foreseeable attack gives rise to the landowner's duty to provide security, the plaintiff must still demonstrate that the lack of security caused or was a substantial factor in bringing about the plaintiff's injury before recovery will be awarded.²⁴⁰ Recently, California courts have limited landowner liability by focusing on causation.²⁴¹ Thus, a significant increase in landowner liability has not resulted since *Isaacs* abandoned the prior similar incidents rule and subjected more cases to jury consideration.²⁴²

A final legal concern focuses upon the proliferation of cases that a new rule of duty would generate.²⁴³ The large volume of tort litigation, coupled with already overburdened court dockets, has been advanced as a practical rationale to explain

234. See NATIONAL CRIME PREVENTION INSTITUTE, *supra* note 160, at 112-13.

235. *Id.* at 113.

236. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d at 31, 695 P.2d at 662, 211 Cal. Rptr. at 365 ("The foreseeability of an assault was high in comparison to the minimal burden on the hospital to take security measures. . .").

In discussing the proposed burden on the defendant, the court also observed that "minimal precautions are certain to have an appreciable effect in preventing crimes in warning patrons. . . . Such minimal measures would not place an onerous burden upon the defendant or society." *Id.* at 129, 695 P.2d at 660, 211 Cal. Rptr. at 363, *quoting* *Gomez v. Tigor*, 145 Cal. App. 3d 622, 632-33, 193 Cal. Rptr. 600, 607 (1983).

Moreover, the duty may also serve a dual purpose. For instance, adequate lighting in parking areas is an essential element in discharging the duty to provide protection against criminal attack. This same security measure, however, may also be useful in dispensing a duty that has long been imposed on the landowner, the duty to exercise reasonable care to make the premises safe. See *supra* note 113. By increasing lighting, a landowner may be able simultaneously to guard against the risk of a patron tripping over an unseen cement block, for example, as well as the risk from acts of third parties.

237. See *supra* notes 146-51 and accompanying text.

238. See *supra* notes 152-54 and accompanying text.

239. See *supra* note 21.

240. See generally W. PROSSER & P. KEETON, *supra* note 2, § 41, at 265-72.

241. See, e.g., *Gregorian v. National Convenience Stores, Inc.*, 174 Cal. App. 3d 944, 220 Cal. Rptr. 302 (1985); *Noble v. Los Angeles Dodgers, Inc.*, 168 Cal. App. 3d 912, 214 Cal. Rptr. 395 (1985).

242. See cases cited *supra* note 241. See also *Ronk v. Parking Concepts of Texas, Inc.*, 711 S.W.2d 409 (Tex. App. 1986) (Parking lot owner not held liable for criminal attack, even when evidence of prior similar incidents was presented; in applying the totality-of-the-circumstances approach, court found insufficient evidence of foreseeability.).

243. *Zacharias*, *supra* note 17, at 699.

court refusal to extend the duty to landowners.²⁴⁴ Where a compelling need for redress exists, foreclosing access to the judicial system is not an appropriate response. Furthermore, as the contours of the duty become increasingly clear through judicial and legislative refinement, fewer cases will actually proceed to trial.

V. PROPOSALS

The preceding discussion of policy implications suggests that, on balance, society's overall interests are best served by requiring landowners to guard against criminal attack. However, the duty also creates many troubling side effects. It is the purpose of this section to propose several ways to minimize the effects produced by an unqualified duty to guard against criminal attack.

The most important consideration in implementing the duty is to preserve the distinction between reasonable, as opposed to adequate, landowner action. Under the proposed duty, the landowner will be required to take *reasonable* steps to guard against criminal attack, not to provide adequate deterrence against all criminal conduct.²⁴⁵ Distinguishing between "reasonable" and "adequate" security measures will thereby reduce the threat of unlimited landowner liability. The jury's attention will be focused away from determining whether particular measures were "adequate,"²⁴⁶ and will instead determine whether the measures were "reasonable."²⁴⁷ For example, a landowner should not be held liable for failure to hire the five armed guards which the plaintiff asserts are necessary to provide adequate protection against the threat of criminal attack, if the landowner has acted reasonably by at least providing sufficient lighting and other inexpensive deterrents. Conceptualizing the duty in terms of minimal precautions, consistent with the realities of the commercial environment, will help prevent imposing unreasonable burdens on landowners. Furthermore, the legislature can clearly define the scope of the landowner's obligation by prescribing specific mandatory safety standards such as lighting or dial-free emergency phones²⁴⁸ which must be implemented.²⁴⁹ Another means to reduce any perceived unfairness in holding the landowner liable is a legislatively-mandated cap on liability.²⁵⁰ There is nothing to preclude the legislature from

244. *Id.* at 702.

245. Even the police are unable to provide an "adequate" deterrence to criminal conduct. Thus, if landowners were required to provide adequate deterrence, then many of the unfair side effects previously discussed would ensue, and the landowner would indeed become an "insurer of the patron's safety."

246. *See supra* note 110. *See also* 7735 Hollywood Blvd. Venture v. Superior Court, 116 Cal. App. 3d 901, 172 Cal. Rptr. 528 (1981).

It would be intolerable and grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were "inadequate," especially in light of the fact that the decision would always be rendered in a case where the security had in fact proved to be inadequate.

Id. at 905-06, 172 Cal. Rptr. at 530.

247. In evaluating reasonableness, the jury will be required to consider the relative costs of the security measures. Thus, the presence of several armed guards at a small establishment most likely will be economically unfeasible; therefore, the landowners failure to provide the guards will not be unreasonable under the circumstances if other, less-costly methods have been utilized by the landowner.

248. *See supra* notes 163-66 and accompanying text.

249. *See supra* notes 211-12 and accompanying text.

250. *See Zacharias, supra* note 17, at 737 n.212.

responding to a tort-imposed duty by limiting the magnitude of the risk of liability.²⁵¹ Such a legislative response would permit courts to require minimal security measures through imposition of a duty, yet minimize the undesirable consequences brought about by the threat of large verdicts.

VI. CONCLUSION

In conclusion, a landowner is charged with an affirmative duty to protect individuals from reasonably foreseeable criminal acts occurring on the premises. Duty and foreseeability, however, are flexible concepts—the same criminal attack may be reasonably foreseeable under one set of circumstances and only a remote possibility under another. The occurrence of prior similar attacks on a landowner's premises is helpful in assessing whether any given attack was capable of reasonable anticipation. The issue of foreseeability is a question for the jury; thus, courts should be skeptical of any blanket rule which automatically prevents questions of fact from reaching the jury. Therefore, the absence of prior similar incidents should not bar a plaintiff's case if other evidence exists to establish a genuine issue of foreseeability.

Furthermore, the *Isaacs* approach evaluates the propriety of the defendant's conduct in light of all relevant circumstances. The landowner is thereby required to take reasonable steps to minimize the threat of criminal attack on his premises. Such an approach recognizes that crime will only be diminished if all facets of society work together. Placing the burden on landowners, as well as on individuals and government, facilitates the effectiveness of the collective effort.

The California Supreme Court decision in *Isaacs v. Huntington Memorial Hospital* properly recognized that the presence of prior similar incidents is not essential to creating a duty in an action against a landowner for criminal acts on the landowner's property. In light of social, legal, and economic policy, it is urged that the Ohio Supreme Court adopt a similar view.

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251. Comprehensive legislation limiting damage awards in the area of medical malpractice provides an apt illustration. See Rodarmor, *The Other Side of Medical Malpractice*, 6 CAL. LAW. 38 (March, 1986).

